

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MATTHEW MICHAEL CONVERSE,

Plaintiff,

vs.

TRISTAN KOHUT, et al.,

Defendants.

CV 16-00039-H-DLC-JTJ

ORDER AND FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE

Plaintiff Michael Converse filed a Complaint under 42 U.S.C. § 1983 alleging Defendants denied him treatment for a knee injury he suffered while in custody. (Doc. 2.) The Court considered whether the Complaint is frivolous, malicious, fails to state a claim, or seeks solely monetary relief from a defendant who is immune pursuant to 28 U.S.C. §§ 1915(e)(2), 1915A(b) and determined that Mr. Converse's allegation that he was denied medical treatment for his knee injury was sufficient to state a claim under the Eighth Amendment to the United States Constitution.¹ Defendants were required to respond. (Doc. 7.)

Defendants Henderson, Kohut and Winner filed an Answer (Doc. 15) but Defendants Scott and Thomas did not return a waiver of service of summons form

¹Mr. Converse's equal protection claim alleged in Count 2 of the Complaint has been recommended for dismissal.

and have not been served. By Order dated April 10, 2017, Mr. Converse was required to provide an address for Defendants Scott and Thomas. (Doc. 18.) Mr. Converse provided an address for Dr. Thomas but did not provide an address for Defendant Scott. (Doc. 20.) Mr. Converse was specifically warned that if he failed to provide the necessary information to effectuate service on these Defendants, the Court would recommend that the claims against those Defendants be dismissed without prejudice absent a showing of good cause. (Scheduling Order, Doc. 18 at 2.)

Accordingly, the Court issues the following:

ORDER

1. Under Fed. R. Civ. P. 4(d), the Court will request Defendant Thomas to waive service of summons of Mr. Converse's Complaint by executing, or having counsel execute, the Waiver of Service of Summons. The Waiver must be returned to the Court within **thirty (30) days of the entry date of this Order as reflected on the Notice of Electronic Filing**. If Defendant Thomas chooses to return the Waiver of Service of Summons, his answer or appropriate motion will be due within **60 days of the entry date of this Order as reflected on the Notice of**

Electronic Filing, pursuant to Fed. R. Civ. P. 12(a)(1)(B).² *See also* 42 U.S.C. § 1997e(g)(2). If Defendant Thomas does not return the signed waiver within the time indicated, the Court will order the U.S. Marshals Service to serve the summons and complaint on him and may impose the full costs of such service.

2. The Clerk of Court shall mail the following documents to Dr. Patrick Thomas, 1401 25th Street South, Great Falls, Montana 59405.

- * Complaint (Doc. 2);
- * December 14, 2016 Order (Doc. 7);
- * Answer (Doc. 15);
- * Motion for Judgement on the Pleadings and brief in support (Docs. 16, 17);
- * Scheduling Order (Doc. 18);
- * this Order;
- * a Notice of Lawsuit & Request to Waive Service of Summons; and
- * a Waiver of Service of Summons.

Counsel for Defendant Thomas must file a “Notice of Appearance” as a separate document at the time an Answer or Rule 12 motion is filed. *See* D. Mont. L.R. 12.2.

3. Any party’s request that the Court grant relief, make a ruling, or take an action of any kind must be made in the form of a motion, with an appropriate caption designating the name of the motion, served on all parties to the litigation,

²Defendant Thomas only has to respond to Count 1 of the Complaint as the Court has recommended the dismissal of Count 2.

pursuant to Federal Rules of Civil Procedure 7, 10, and 11. If a party wishes to give the Court information, such information must be presented in the form of a notice. The Court will not consider requests made or information presented in letter form.

4. Mr. Converse shall not make any motion for default until at least seventy (70) days after the date of this Order.

5. At all times during the pendency of this action, Mr. Converse must immediately advise the Court and opposing counsel of any change of address and its effective date. Failure to file a notice of change of address may result in the dismissal of the action for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

Further, the Court issues the following:

RECOMMENDATIONS

Defendant Smith should be DISMISSED WITHOUT PREJUDICE pursuant to Fed.R.Civ.P. 4(m) for failure to effect service.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT

The parties may file objections to these Findings and Recommendations within fourteen (14) days after service (mailing) hereof.³ 28 U.S.C. § 636. Failure

³As this deadline allows a party to act after the Findings and Recommendations is “served,” it falls under Fed.R.Civ.P. 6(d). Therefore, three (3) days are added after

to timely file written objections may bar a de novo determination by the district judge or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Fed.R.App.P. 4(a), should not be filed until entry of the District Court's final judgment.

DATED this 27th day of June 2017.

/s/ John Johnston
John Johnston
United States Magistrate Judge

the period would otherwise expire.

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Rule 4 Notice of a Lawsuit and
Request to Waive Service of
Summons

TO: Patrick Thomas, M.D.
1401 25th Street South
Great Falls, Montana 59405.

A lawsuit has been filed against you in this Court under the number shown above. A copy of the Complaint is attached.

This is not a summons or an official notice from the court. It is a request that, to avoid the cost of service by the U.S. Marshals Service, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must file the signed waiver within 30 days from the date shown below, which is the date this notice was sent.

If you file the signed waiver, the action will then proceed as if you were served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to

answer the complaint.

If you do not return the signed waiver within the time indicated, the Court will order the U.S. Marshals Service to serve the summons and complaint on Defendant and may impose the full costs of such service.

Please read the statement below about the duty to avoid unnecessary expenses.

DATED this 27th day of June 2017.

/s/ John Johnston
John Johnston
United States Magistrate Judge

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

“Good cause” does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant’s property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

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Rule 4 Waiver of the Service of
Summons

TO: The U.S. District Court for the District of Montana

I acknowledge receipt of your request to waive service of summons in this case. I have received a copy of the Complaint. I agree to save the cost of service of a summons and an additional copy of the Complaint in this action by not requiring that I be served with judicial process in the case provided by Fed.R.Civ.P. 4.

I understand that I will keep all defenses or objections to the lawsuit, the Court's jurisdiction, and the venue of the action, but waive any objections to the absence of a summons or of service.

I also understand that I must file and serve an answer or a motion under Rule

12 within 60 days from the date when the Request for Waiver of Service of
Summons was filed and if I fail to so default judgment will be entered against me.

Date: _____

(Signature of the attorney
or unrepresented party)

(Printed name)

(Address)

(E-mail address)

(Telephone number)